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U.S. Citizenship
and Immigration
Services

DEC 07 2004

FILE:

WAC 03 081 52512

Office: CALIFORNIA SERVICE CENTER Date:

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a convenience store and gas station. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel¹ asserts that the director failed to properly analyze the petitioner's tax returns.

Current counsel indicated on the notice of appeal, filed November 4, 2003, that a brief and/or evidence would be submitted to the AAO within 30 days. As no additional documentation has been received to the record, this decision will be made on the record as it currently stands.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$23.39 per hour, which amounts to \$48,651.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

Because the petitioner submitted insufficient evidence to demonstrate its ability to pay the beneficiary's proposed wage offer of \$48,651.20, on March 6, 2003, the director requested the petitioner to submit additional evidence pertinent to that ability. The director instructed the petitioner to provide copies of its 1998 through 2002 tax

¹ As no properly signed Notice of Entry of Appearance as Attorney or Representative (Form G-28) appears in the record on behalf of the petitioner, the petitioner will be considered as representing itself on appeal. A copy of this decision will be furnished to the attorney who submitted the appeal.

returns, copies of the last four quarters of its state quarterly wage reports, and copies of the beneficiary's 2001 and 2002 tax returns, along with the corresponding Wage and Tax Statements (W-2s).

In response, the petitioner provided copies of its 1998 through 2001 tax returns. They indicate that the petitioner files its taxes using a fiscal year running from July 1st to June 30th of the following year. Thus its 1998-2001 tax returns cumulatively represent data from July 1, 1998 through June 30, 2002. Former counsel explained in a transmittal letter that the petitioner had not yet filed its 2002 tax return yet. He also stated that the beneficiary was unable to provide W-2s because he works by contract.

Form 1120, U.S. Corporation Income Tax Returns tax returns for the petitioner reflect the following information for the following years:

	1998	1999	2000	2001
Net income	\$29,739	-\$10,742	\$ 6,737	\$ 9,980
Current Assets	\$69,006	\$61,668	\$62,296	\$47,500
Current Liabilities	\$21,725	\$25,129	\$19,020	\$17,879
Net current assets	\$47,281	\$36,539	\$43,276	\$29,621

In addition, the petitioner submitted three copies of its annual federal unemployment tax returns for 2000, 2001 and 2002, showing that it paid unemployment taxes on salaries averaging \$67,000 per year.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 18, 2003, issued a notice of intent to deny the petition. The director noted that the petitioner's taxable income figures for the period between 1998 and 2001 did not demonstrate sufficient income out of which to pay the proffered wage. The petitioner was given an additional 30 days to respond to the notice of intent to deny the petition with relevant evidence or argument. The director again requested the petitioner to submit its income tax return for 2002 and evidence relating to the beneficiary's employment status.

In response, the petitioner, through former counsel, submitted a copy of an Internal Revenue Service (IRS) form to request an extension of time to file its 2002 tax return and various copies of the beneficiary's bank account statements. Former counsel states in a cover letter that the beneficiary does not yet work for the petitioner.

On appeal, current counsel merely asserts that the petitioner has the financial ability to pay the proffered wage. He claims that the director erred in denying the petition because the petitioner's income tax returns were incorrectly evaluated. As mentioned above, no further evidence or argument has been submitted to support this contention.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the

petitioner's ability to pay the proffered wage. In the instant case, nothing in the record indicates that the petitioner employed the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this case, as noted above, the petitioner's net income of \$29,739, -\$10,742, \$6,737, and \$9,980, in each of the years from 1998 through 2001, respectively, failed to represent sufficient amounts to pay the proffered wage of \$48,651.20.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. CIS will also consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities,² and are a measure of a petitioner's liquidity during a given period. A corporation's year-end current assets are shown on Schedule L, lines (1) through (6). Its year-end current liabilities are shown on lines (16) through (18). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets of \$47,281 in 1998; \$36,539 in 1999; \$43,276 in 2000; and \$29,621 in 2001, however, were also insufficient to cover the proffered salary in any of these years. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during any of the periods covered by the tax returns contained in the record. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

ORDER: The appeal is dismissed.